No. 89-5809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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On consent of the parties, the American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* in support of the retroactive consideration of the petitioner's claim under *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). 1/

1/ The consents of the parties are on file with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The ABA is a voluntary, national membership organization of the legal profession with more than 365,000 members in all states and territories and the District of Columbia. The ABA includes prosecutors, public defenders, private lawyers, trial and appellate judges of state and federal courts, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates.

Believing the issue to be fundamental to a more just system of capital punishment, the ABA submits this brief to set forth its view as to the correct construction of the "fundamental fairness" exception to the doctrine of *Teague* v. *Lane*, 109 S. Ct. 1060 (1989) in the capital sentencing context. The ABA believes it has unique experience to bring to bear on that issue, at two levels.

First, the ABA recently completed an intensive, year-long study of the process of post-conviction review of capital convictions and sentences. Presupposing the continued existence of both capital punishment and federal habeas corpus, the study undertook to formulate concrete recommendations which would enhance the efficiency and fairness of state and federal review procedures.

This study was conducted by the ABA Task Force on Death Penalty Habeas Corpus ("ABA Task Force"), composed of individuals with a wide range of experience and perspectives: state and federal judges, government and defense capital post-conviction lawyers, a court administrator and academicians. The ABA Task Force held public hearings in Atlanta, Dallas, and San Francisco and heard from more than eighty knowledgeable witnesses from all corners of the criminal justice process. Among the topics studied by the ABA Task Force were the doctrine of *Teague* v. *Lane* and the scope of the two exceptions recognized by *Teague* to its general rule of non-retroactivity on federal collateral review. *Toward a More Just and Effective System of Review in State Death Penalty Cases: Recommendations and Report of the American Bar Association on Death Penalty Habeas Corpus*, 315-325 (October 1989) (hereinafter referred to as the "ABA Task Force Report").

The work of the Task Force culminated in the adoption of a set of recommendations by the Council of the ABA's Criminal Justice Section. On February 13, 1990, those recommendations, including one which specifically addressed the construction of the "fundamental fairness" exception to *Teague*, were adopted by the ABA House of Delegates. 2/

In addition to its special knowledge of the process of federal habeas review in capital cases, the ABA is also singularly situated to comment on the fundamental nature of the constitutional principle enunciated in *Caldwell*. The ABA has long played a leading role in promoting standards of professional conduct fundamental to the fairness of our system of adjudication. *See, e.g.*, ABA Standards for Criminal Justice; ABA Model Code of Professional Responsibility and Code of Judicial Conduct; ABA Model Rules of Professional Conduct. The ABA has specifically been concerned about protecting the integrity of the jury's central function in criminal cases.

2/ Resolution 115E, adopted by the ABA House of Delegates on February 13, 1990 at its Mid-Year Meeting. Copies of the resolution and the supporting Report and Recommendations of the Criminal Justice Section to the ABA House of Delegates (hereinafter referred to as the "ABA CJS Report and Recommendations") have been lodged with the Clerk of the Court. Paragraph 15 of Resolution 115E states:

> The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

ABA CJS Report and Recommendations, 4.

The ABA has expressed that concern in standards which, among other things, govern prosecutorial argument to the jury. As early as 1971, the ABA stressed that "[r]eferences to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision." *See* ABA Standards For Criminal Justice, 3–5.8 (2d ed. 1980); *see also* ABA Project on Standards for Criminal Justice: Standards Relating to the Prosecution Function and the Defense Function, 3–5.8, Commentary p. 129 (App. Draft 1971). This Court relied in part on the ABA standard in endorsing the rule under which Sawyer now seeks reversal of his death sentence. *See Caldwell*, 472 U.S. at 334 n.6.

SUMMARY OF ARGUMENT

This Court should construe the "fundamental fairness" exception announced in *Teague* to permit death-sentenced habeas petitioners to receive the benefit of those new constitutional rules without which the likelihood of an accurate sentencing judgment is seriously diminished. The focus of the test should be on the effect of the rule in assuring the integrity of the capital sentencing process, rather than on the factual innocence of particular petitioners.

The Eighth Amendment rule established in *Caldwell* is fundamental to the integrity of the capital sentencing process. Where a jury may have been misled by prosecutorial remarks which produce a pro-death bias and distract the jury from giving a "reasoned *moral* response" to the evidence, *Penry* v. *Lynaugh*, 109 S. Ct. 2934, 2947 (1989) (emphasis in original), confidence in the reliability of the death sentence is seriously diminished. Thus, *Caldwell* should be retroactively applied under the second exception to *Teague*.

ARGUMENT

I

UNDER *TEAGUE*'S "FUNDAMENTAL FAIRNESS" EXCEPTION, DEATH-SENTENCED HABEAS PETITIONERS SHOULD RECEIVE THE BENEFIT OF NEW RULES WHICH UNDERMINE CONFIDENCE IN A CAPITAL JURY'S SENTENCING PROCESS

The Proper Standard

In its study of federal habeas review, the ABA gave considerable thought to the proper interpretation of the general rule of non-retroactivity announced in *Teague* v. *Lane*, and specifically solicited the views of numerous recognized experts about what the second of *Teague*'s two exceptions ought to mean.

The second exception covers those new rules [3/] which alter the Court's view of the "fundamental fairness of the trial" and significantly improve its accuracy. *Teague*, 109 S. Ct. at 1076. In defining the second exception, *Teague* combined two principles: (1) that new law should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" *Teague*, 109 S. Ct. at 1073 (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)); and (2) that the "likely accuracy of convictions" is relevant to the scope of habeas review, *Teague*, 109 S. Ct. at 1076.

In conducting its study, the ABA recognized that the Court has not yet resolved the question of how the "fundamental fairness" exception of *Teague* should be applied to the sentencing phase of capital trials. *See* ABA Task Force Report, 321–23. [4/]

3/ This brief does not address the threshold question of whether *Caldwell* represents a "new rule" for *Teague* purposes.

4/ *Teague* was not a capital case. In *Penry*, the Court held that *Teague* applied to capital cases, but the Court had no occasion to interpret the "fundamental fairness" exception in that context.

To address that question, and others, the ABA Task Force heard from more than eighty witnesses in its public hearings -- including a state governor, a United States Senator, state legislators, federal trial and appellate judges, state supreme court judges, state attorneys general and their staff, prosecuting attorneys, state and federal public defenders, directors of death penalty resource centers, volunteer post-conviction counsel, representatives of victims' rights organizations, professors and others.

Based on its analysis of the vast amount of information collected during its study of the area, the ABA recommends that *Teague*'s "fundamental fairness" exception be construed to mean that "any claim that undermines a court's confidence in the . . . sentencing determination in a capital case shall be governed by the law at the time the court considers the petition [for habeas relief]." ABA CJS Report and Recommendations, 51.

The Need for Heightened Scrutiny of Capital Sentencing Procedures

Underlying the ABA's recommendation is the time-honored principle, often expressed by this Court, that "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . ." ABA Task Force Report, 344. This Court has repeatedly held that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U.S. 992, 998-99 (1983) (citing numerous prior cases).

The principle of heightened scrutiny for capital sentencing phase procedures which has pervaded this Court's jurisprudence in the years since *Furman* v. *Georgia*, 408 U.S. 238 (1972), is no transient phenomenon. For as long as death has been an available penalty under Anglo-American law, capital sentences have been reviewed with special concern and the courts have followed the rule of parsing the record *in favorem vitae*, or in favor of life.

See L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, 83-106 (Stevens & Sons, Ltd. 1948).

The Continuing Evolution of Fundamental Capital Sentencing Rules

In addition to the well-established tradition of interpreting penalty phase procedures *in favorem vitae*, the ABA's recommendation is based upon a recognition that the interpretation of the Constitution in this area is still evolving. ABA CJS Report and Recommendations, 50. "Because this area of law is a relatively new one, the Supreme Court still regularly announces rules which are designed to insure basic fairness in capital sentencing." *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 Rec. of the Assoc. of the Bar of The City of New York, 848, 863 n.43 (1989).

When this Court predicted that the "fundamental fairness" exception to *Teague* would be a narrow one, in part because it is "unlikely that many . . . components of basic due process have yet to emerge," *Teague*, 109 S. Ct. at 1077, it was speaking of the guilt-innocence determination, not the capital sentencing determination. [5/]

We turn now to an examination of how our proposed standard should be applied in practice.

5/ Moreover, at the time those words were written, *Caldwell* had already been decided and the rule of *Caldwell* had already taken its place among the "components of basic due process," *Teague*, 109 S. Ct. at 1077.

II

IN APPLYING THE "FUNDAMENTAL FAIRNESS" EXCEPTION, THE COURT SHOULD FOCUS ON THE INTEGRITY OF THE CAPITAL SENTENCING PROCESS, NOT ON THE FACTUAL INNOCENCE OF PARTICULAR PRISONERS

In concluding that those new rules which undermine confidence in the jury's sentencing judgment in a capital case should be retroactively applied, the ABA determined that *Teague*'s "fundamental fairness" exception should be used to protect the integrity of the process by which the death sentence was imposed, and not simply to guard against the execution of persons either innocent of the crime or somehow "innocent" of the death penalty. In other words, once a capital trial has reached the "selection stage" at which "[w]hat is important . . . is an individualized determination [of sentence] on the basis of the character of the individual and the circumstances of the crime," *Zant* v. *Stephens*, 462 U.S. 862, 879 (1983) (emphasis omitted), the focus of the second *Teague* exception should be on the nature of any constitutional error and its tendency to subvert the process of individualized sentencing choice.

The Jury's Capital Sentencing Decision Is Qualitatively Different from a Decision on Guilt or Innocence

The focus of the Fifth Circuit majority on whether Sawyer had shown "factual innocence" or "actual prejudice" was misplaced. At the sentencing phase, a capital jury must do something very different from what it did at the guilt- innocence phase. The jury must make a sentencing *judgment*, not simply find facts. It must make a reasoned *moral* response to the evidence, not decide whether particular elements have been proved or determine any "similar 'central issue' [of fact]," *Ramos*, 463 U.S. at 1008. To discharge this function, it must correctly understand the nature of its responsibilities.

All defendants who have been lawfully convicted — and are not covered by *Teague*'s first exception -- are, by definition, eligible for death once they reach the selection stage. [6/] The jury cannot make a "wrong" decision since death is, at that stage, always a permissible punishment. It is therefore meaningless to ask whether a *convicted* defendant who has reached the selection stage is "actually innocent" of the death penalty.

While the jury may be asked to find certain facts relating to the existence of aggravating or mitigating factors, its ultimate sentencing choice remains discretionary. As the Court said in *Caldwell*, the jury's decision to punish by death is a "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Caldwell*, 472 at 340 n.7 (quoting *Zant*, 462 U.S. at 900 (Rehnquist, J., concurring in judgment)). This Court has stressed that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry*, 109 S. Ct. at 2947 (emphasis in original). No appellate court, therefore, can determine whether the jury was "right" or "wrong" to choose death, or determine what a jury would have done in an untainted sentencing proceeding. It can only inquire into the fundamental fairness of the process by which the result was reached.

6/ Rules which defeat death eligibility, e.g., *Coker* v. *Georgia*, 433 U.S. 584 (1977), would fall within *Teague*'s first exception. See *Penry*, 109 S. Ct. at 2953. Under that exception, a new rule will be retroactive if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 109 S. Ct. at 1073 (quoting *Mackey* v. *United States*, 401 U.S. 667, 692 (1971) (separate opinion of Harlan, J.)). As this Court has subsequently explained, the first exception covers not only rules forbidding criminal punishment of certain primary conduct, but also rules prohibiting the death penalty for a class of defendants because of their status or offense. *Penry*, 109 S. Ct. at 2953.

For this reason, the ABA concluded after extensive consideration that the appropriate inquiry for a court faced with the question of whether a particular constitutional claim arising out of the capital sentencing process falls within the "fundamental fairness" exception to *Teague* should be: whether the constitutional rule invoked by the claim is one whose violation predictably lessens the integrity of sentencing determinations.

The Inappropriateness of
the Fifth Circuit Standard

The Fifth Circuit properly acknowledged that errors which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all," *Sawyer* v. *Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989), fall within *Teague*'s second exception. The court gave as an example of such an error a jury verdict rendered in fear of mob rule. *Id.* (relying on *Teague*, 109 S. Ct. at 1077). The Fifth Circuit, however, failed to recognize that *Caldwell* error is also of precisely that type: although the facts of a case may have been presented to the jury, it was prevented by misleading prosecutorial argument from rendering an undistorted sentencing judgment. *Cf. Hitchcock* v. *Dugger*, 481 U.S. 393, 398–99 (1987); *Penry*, 109 S. Ct. at 2951. Indeed, as is discussed in greater detail in Part III of this brief, it is exactly because *Caldwell*-type arguments distort the jury's decision-making process that the ABA long ago concluded that such arguments by prosecutors should be impermissible.

The Fifth Circuit majority justified its conclusion that *Caldwell* does not satisfy *Teague*'s second exception by relying on *Dugger* v. *Adams*, 109 S. Ct. 1211 (1989). In *Adams*, this Court found that because Adams could not show that he was "'actually innocent' of the death sentence," a refusal to consider his procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice." *Id.* at 1218 n.6. Importing this "actual innocence" standard into *Teague*'s retroactivity analysis, the Fifth Circuit wrote:

> It is difficult to see why a *Caldwell* violation would be sufficiently fundamental to require an exception to the 'new rule' doctrine, but not so fundamental as to require an exception to the procedural default doctrine.

Sawyer, 881 F.2d at 193–94.

The suggested parallelism between the non-retroactivity doctrine of *Teague* and the procedural default doctrine of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), is inapposite. The two doctrines have different purposes, which justify — indeed, mandate — different analyses in their application.

In *Sykes* this Court held that habeas petitioners must show "cause" and "prejudice" before the federal courts will review claims that the state courts have procedurally barred. The rationale of *Sykes* is that state procedural rules are specifically designed to expose and correct errors — to enable the state courts to "mend their own fences," *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982) — and that the federal courts should encourage these efforts by refusing to undermine them on federal habeas corpus. Accordingly, when a federal habeas court is asked to review a defaulted state claim, it must investigate the reason for the default in order to determine whether the prisoner has made a compelling case that he should be excused from compliance with the state's generally applicable procedural rules.

Assuming that the prisoner was represented by competent counsel, the fact that a constitutional error is shown to have occurred without objection is presumed to indicate that it had no adverse impact on the prisoner's case — that the case rather presents the situation of a party declining to invoke a theoretical right because it is of no practical consequence under the circumstances or for strategic reasons. *See Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Strickland* v. *Washington*, 466 U.S. 668,687–91 (1984). Correlatively, the presumption is strong that if an objection *had* been made, the error would have been corrected. The state is enti-

tled to rely on the assurance that it will not later be sandbagged by errors it never had a chance to correct.

These considerations have been held to permit only a narrow exception to the *Sykes* procedural-bar rule: one to avert a "fundamental miscarriage of justice." To come within this exception, a habeas petitioner must make a compelling showing that his failure to raise appropriate objections did not unfairly prejudice the state and that the unobjected-to error *did* prejudice him by producing an unwarranted result. Unsurprisingly, such a showing may be tantamount to a colorable demonstration of actual innocence. *See Murray* v. *Carrier*, 477 U.S. 478, 496 (1986).

The purpose of the non-retroactivity doctrine of *Teague* is very different than the purpose of the procedural bar rule. *Teague* deals with the situation in which the constitutional principle invoked by a habeas petitioner was not recognized at the time of trial, so that the petitioner's failure to invoke it then neither signified the harmlessness of the proceedings nor deprived the state of a chance to correct them. *Teague* is designed to promote the even-handed enforcement of constitutional rights and the legitimate reliance of the states upon the stability of legal rules by denying retroactive effect to new rules unless their nature compels it. For this purpose, an inquiry into the "actual innocence" or "actual innocence of the death penalty" of each particular federal habeas petitioner who claims the benefit of a supervening constitutional ruling would be irrelevant. The relevant inquiry should rather be whether the risk of harm to constitutional interests recognized by the supervening ruling does or does not outweigh the states' reliance interest in a previous and less protective rule of law for all cases of a given vintage. In the case of capital sentencing, this inquiry requires an examination of whether the new rule is basic to assuring that the jury's sentence will represent its "reasoned *moral* response" to the defendant and his conduct. *Penry*, 109 S. Ct. at 2947; *see also Franklin* v. *Lynaugh*, 108 S. Ct. 2320, 2333 (1988) (O'Connor and Blackmun, JJ., concurring in judgment).

III

THE RULE OF *CALDWELL* IS FUNDAMENTAL TO THE INTEGRITY AND ACCURACY OF THE CAPITAL SENTENCING PROCESS AND THUS QUALIFIES FOR EXCEPTION UNDER *TEAGUE*

In *Caldwell*, the Court held that where a prosecutor's argument incorrectly leads a sentencing jury to believe that the responsibility for determining the appropriateness of a death sentence rests with appellate judges, rather than the jury, the resulting capital sentence is inconsistent with the Eighth Amendment's recognition of the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell*, 472 U.S. at 323 (citing *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

The ABA has long been involved in evaluating the impact of *Caldwell*-type arguments on the reliability of jury determinations, as part of its work in developing and updating professional standards for prosecutors. One such set of standards was developed by a special committee of the ABA which drew on the experience of a large number of prosecutors, defense lawyers and judges. Since 1971, those ABA standards have provided that:

> References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision.

ABA Project on Standards for Criminal Justice: Standards Relating to the Prosecution Function and the Defense Function, 3-5.8, Commentary p.129 (App. Draft 1971). The ABA's expertise in this area, particularly as it relates to the distortion produced in the capital sentencing process, has been enhanced by its recent empirical examination of federal habeas review procedures.

Based on its long experience and its recent thorough study of habeas corpus, the ABA is convinced that if *Caldwell* is violated, the capital sentencing process is so fundamentally disrupted as to undermine confidence in the outcome and that therefore *Teague*'s second exception should apply to *Caldwell* claims. There is no rule which more legitimately belongs within *Teague*'s "fundamental fairness" exception than does the rule of *Caldwell*.

Caldwell error disrupts a capital jury's ability to give its "reasoned moral response" to the evidence. As this Court recognized in *Caldwell*, the capital jury's acceptance of responsibility for its life-or-death decision is integral to the legitimate exercise of its sentencing discretion. "This Court has always premised its capital punishment decisions on the assumption that the capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell*, 472 U .S. at 341; cf. *Adams* v. *Texas*, 448 U.S. 38, 49-50 (1980).

If a prosecutor misleadingly tells a jury that it is not ultimately responsible for deciding whether death is the appropriate punishment in a particular case, the jury will be diverted away from making a "reasoned moral response" to the evidence and towards constitutionally impermissible considerations. *Cf. Beck* v. *Alabama*, 447 U.S. 625 (1980). Not only does *Caldwell* error undermine the reliability of the sentencing judgment in this way, it affirmatively invites the imposition of a death sentence without a finding that such a sentence is appropriate in the case at bar. As this Court explained in *Caldwell*,

> If a jury understands that only a death sentence will be reviewed, it will also understand that any decision to "delegate" responsibility for sentencing can only be effectuated by returning that sentence.

Caldwell, 472 U.S. at 332. In addition:

> Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely "err because the error may be corrected on appeal."

Id., at 331 (quoting *Maggio* v. *Williams*, 464 U.S. 46, 54-55 (1983) (Stevens, J., concurring in judgment)).

By inviting the jury to "send a message" and to impose what it is led to believe may only be a "symbolic" death sentence, prosecutorial argument that violates *Caldwell* also distracts the jury from assessing the concrete features of the case before it which may call for harshness or for leniency, and thereby jeopardizes the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner* v. *Shuman*, 483 U.S. 66, 75 (1987); *see also Mills* v. *Maryland*, 108 S. Ct. 1860, 1870 (1988); *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976).

The correctness of the ABA's position that *Caldwell* error seriously undermines confidence in the jury's ability to make a responsible sentencing judgment is also shown by the consistent judicial condemnation of such error. In case after case since 1873, state courts have reversed as unreliable the death sentences or convictions of capital defendants whose juries were misled by *Caldwell*-type error. *See, e.g., State* v. *Robinson*, 421 So.2d 229, 233-34 (La. 1982) (prosecutor's remarks required reversal where the attention of the jury, which was misled about the power of appellate courts, was diverted away from the primary sentencing issue of the appropriateness of death); *Blackwell* v. *State*, 76 Fla. 142, 79 So. 731 (Fla. 1918) (prosecutor's remark that any error could be corrected by the Supreme Court required reversal because it "tended to lessen the weight of the jury's sense of responsibility" and caused jurors to shift responsibility "from their consciences to the Supreme Court"); *Commonwealth* v. *Smith*, 10 Phila. 189, 39 Phila Leg. Int. 201 (Pa. 1873) (prosecutor's closing

argument which led the jury away from its own consideration of the defendant's case required reversal). [7/]

This impressive confluence of authority demonstrates a deeply rooted consensus that the prosecutorial misconduct condemned by this Court in *Caldwell* so seriously undermines confidence in a jury's sentencing determination as to constitute a violation of "fundamental fairness." Such misconduct plainly calls for application of the "fundamental fairness" exception to *Teague*.

7/ *See also Wiley* v. *State*, 449 So.2d 756, 762 (Miss. 1984); *Williams* v. *State*, 445 So.2d 798, 811-12 (Miss. 1984); *State* v. *Jones*, 251 S.E.2d 425, 427-29 (S.C. 1979); *Hawes* v. *State*, 240 S.E.2d 833, 839 (Ga. 1977); *Fleming* v. *State*, 240 S.E.2d 37, 40 (Ga. 1977); *State* v. *White*, 211 S.E.2d 445, 450 (N.C. 1975); *Prevatte* v. *State*, 214 S.E.2d 365, 367-68 (Ga. 1975); *People* v. *Morse*, 388 P.2d 33, 43-44 (Cal. 1964); *State* v. *Mount*, 152 A.2d 343, 352 (N.J. 1959); *Pait* v. *State*, 112 So.2d 380, 384 (Fla. 1959); *State* v. *Hawley*, 48 S.E.2d 35, 36 (N.C. 1948); *People* v. *Johnson*, 284 N.Y.182, 30 N.E.2d 465, 467 (N.Y. 1940).

CONCLUSION

For the above-stated reasons, the ABA urges that this Court hold that *Caldwell* is retroactively applicable under *Teague*'s second exception.

Dated: March 2, 1990

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